

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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9 BRANCH BANKING AND TRUST
10 COMPANY, a North Carolina banking
corporation,

10 2:12-cv-01775-LRH-PAL

11 Plaintiff,

11 ORDER

12 v.

13 SOSSAMAN & GUADALUPE PLAZA,
14 LLC, a Nevada limited liability company,
YOEL INY; NOAM SCHWARTZ; YOEL
INY, Trustee of the Y&T INY FAMILY
15 TRUST dated June 8, 1994; NOAM
SCHWARTZ, Trustee of the NOAM
16 SCHWARTZ TRUST dated August 19, 1999;
D.M.S.I., LLC, a Nevada limited liability
17 company; and DOES 1 through 10, inclusive,

18 Defendants.

19 SOSSAMAN & GUADALUPE PLAZA,
20 LLC, a Nevada limited liability company,
YOEL INY; NOAM SCHWARTZ; YOEL
INY, Trustee of the Y&T INY FAMILY
21 TRUST dated June 8, 1994; NOAM
SCHWARTZ, Trustee of the NOAM
22 SCHWARTZ TRUST dated August 19, 1999;
23 and D.M.S.I., LLC, a Nevada limited liability
company,

24 Counterclaimants.

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1 Before the Court is Plaintiff/Counterdefendant Branch Banking and Trust Company's
 2 ("Branch Banking") Motion to Dismiss Counterclaims. Doc. #90.¹ Defendants/Counterclaimants
 3 Sossaman & Guadalupe Plaza, LLC; Yoel Iny; Noam Schwartz; Yoel Iny, trustee of the Y&T
 4 Family Trust dated June 8, 1994; Noam Schwartz, trustee of the Noam Schwartz Trust dated
 5 August 19, 1999; and D.M.S.I., LLC (collectively "Defendants") filed a Response (Doc. #97) to
 6 which Branch Banking replied (Doc. #98).

7 **I. Facts and Background**

8 This action arises out of Defendants' alleged breach of a secured loan agreement.
 9 Following a judicial foreclosure sale on the real property securing the loan, Branch Banking filed
 10 the present action to obtain a deficiency judgment against Defendants. Doc. #1. On October 28,
 11 2013, Defendants filed a Second Amended Answer and Counterclaim against Branch Banking
 12 asserting claims for breach of contract and promissory estoppel. Doc. #74. Therein, Defendants
 13 allege that they entered into an oral contract with Branch Banking, whereby representatives of
 14 Branch Banking, Oscar Bruni ("Bruni") and Robert Thomas ("Thomas"), explicitly promised that
 15 Branch Banking would "provide Defendants with adequate time and opportunity to propose and
 16 implement a real estate property action plan to address and work-out certain Colonial Bank loans
 17 ('Work-out Agreement')." *Id.* at ¶8. In reliance thereon, Defendants claim to have "expended
 18 many, many hours and substantial money, executing tasks in furtherance of the Work-out
 19 Agreement," and "submitted extensive financial information, documentation and proposed plan(s)
 20 to [Branch Banking]." *Id.* at ¶¶10-11. In return for this performance, Defendants allege that
 21 "[Branch Banking] orally agreed to forbear from enforcing certain rights under the [aforementioned
 22 loan] and otherwise refrain from foreclosing on the property securing said [l]oan." *Id.* at ¶12.
 23 Branch Banking allegedly "breached the Work-out Agreement by arbitrarily rejecting Defendants'
 24 proposal(s) and returning checks to Defendants which contained interest payments" and "initiating

25
 26 ¹ Refers to the Court's docket number.

1 foreclosure proceedings on . . . the property securing [the aforementioned loan], resulting in
 2 foreclosure at liquidated values in a depressed real estate market.” *Id.* at ¶¶13-14. On November
 3 22, 2013, Branch Banking filed the present Motion to Dismiss Counterclaims. Doc. #90.

4 **II. Legal Standard**

5 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure
 6 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state
 7 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading
 8 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That
 9 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is
 10 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require
 11 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a
 12 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 556
 13 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

14 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,
 15 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550
 16 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows the Court to
 17 draw the reasonable inference, based on the Court’s judicial experience and common sense, that the
 18 defendant is liable for the misconduct alleged. *See id.* at 678-79. “The plausibility standard is not
 19 akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has
 20 acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant’s
 21 liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.* at
 22 678 (internal quotation marks and citation omitted).

23 In reviewing a motion to dismiss, the Court accepts the facts alleged in the complaint as
 24 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of
 25 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*
 26 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 681) (brackets in original)

1 (internal quotation marks omitted). The Court discounts these allegations because “they do nothing
 2 more than state a legal conclusion—even if that conclusion is cast in the form of a factual
 3 allegation.” *Id.* (citing *Iqbal*, 556 U.S. at 681). “In sum, for a complaint to survive a motion to
 4 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
 5 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

6 **III. Discussion**

7 **A. First Cause of Action for Breach of Oral Contract**

8 First, Branch Banking contends that Defendants’ Counterclaim fails because the underlying
 9 loan documents² do not permit oral modifications. Specifically, the Promissory Note Secured by
 10 Deed of Trust³ provides, in relevant part, “No waiver by Lender of any right or remedy shall be
 11 effective unless in writing and signed by Lender” Doc. #90, Ex. 1, p. 3. Moreover, the
 12 Guarantor⁴ provides, in relevant part, “No provision of this Guarantor or right granted to Lender
 13 hereunder can be waived in whole or part nor can Guarantor be released from Guarantor’s
 14 obligations hereunder except by a writing duly executed by an authorized officer of Lender.” Doc.
 15 #90, Ex. 2, p. 8.

16 “[W]hen a contract is clear on its face, it will be construed from the written language and

17 ² While courts do not typically consider material beyond the pleadings in evaluating a motion
 18 to dismiss, a court may “consider certain materials—documents attached to the complaint, documents
 19 incorporated by reference in the complaint, or matters of judicial notice—without converting the
 20 motion to dismiss into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 908
 21 (9th Cir. 2003). Here, Branch Banking attached and incorporated the relevant loan documents to its
 22 Complaint. *See* Doc. #1, Ex. 1; Doc. #1, Ex. 3. Moreover, Defendants acknowledged signing the loan
 23 documents. *See* Doc. #74, ¶¶14-16. Accordingly, the Court shall consider the loan documents in
 24 evaluating the viability of Defendants’ Counterclaims for breach of oral contract and promissory
 25 estoppel.

26 ³ Defendant Sossaman & Guadalupe Plaza, LLC executed the Promissory Note Secured by
 27 Deed of Trust.

28 ⁴ Defendants, Yoel Iny; Noam Schwartz; Yoel Iny, trustee of the Y&T Family Trust dated
 29 June 8, 1994; Noam Schwartz, trustee of the Noam Schwartz Trust dated August 19, 1999; and
 30 D.M.S.I., LLC executed the Guarantor.

1 enforced as written.” *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776 (2005) (internal
2 quotation marks and citation omitted). Here, the Court finds no ambiguity in the terms of the
3 aforementioned loan documents. The clauses unequivocally provide that Branch Banking may not
4 waive any of its rights or remedies under the loan agreements unless it does so in writing.
5 Accordingly, the Court is bound to an interpretation of these terms whereby any modification
6 affecting Branch Banking’s rights or remedies shall require a writing. *See id.* (“[t]he court has no
7 authority to alter the terms of an unambiguous contract”). Because any agreement to forbear
8 enforcement of its right to foreclose on the underlying property securing the loan is, in essence, a
9 waiver by Branch Banking of its rights and remedies under the aforementioned loan documents, the
10 Court finds that the alleged Work-out Agreement to this effect is unenforceable as it fails to comply
11 with the explicit writing requirement in the loan agreements. As such, Defendants breach of oral
12 contract claim fails on this ground.

13 Second, Branch Banking contends that the alleged oral contract at issue is void pursuant to
14 the Nevada Statute of Frauds, which requires a writing for “[e]very agreement that, by the terms, is
15 not to be performed within 1 year from the making thereof.” Nev. Rev. Stat. 111.220(1). The
16 Court agrees. Only those oral agreements which are capable of being fully performed within a year
17 from execution are not void under the Statute of Frauds. *See Stanley v. A. Levy & J. Zentner Co.*,
18 60 Nev. 432, 112 P.2d 1047, 1052 (1941). The fact that performance exceeds one year does not
19 render an agreement void where the terms therein do not indicate that it could not be performed
20 within one year. *See Atwell v. Sw. Secs.*, 107 Nev. 820, 820 P.2d 766, 769 (1991) (finding that
21 verbal contract with indefinite duration was not void under Nevada’s Statute of Frauds where there
22 was nothing to indicate that it could not be fully performed within one year). Moreover, the Statute
23 of Frauds does not encompass agreements that are “simply not likely to be performed,” or
24 agreements that are “simply not expected to be performed, within the space of a year from the
25 making.” *Stanley*, 112 P.2d at 1052 (quoting Browne on the Statute of Frauds, Page 327, § 273,
26 4th Ed.). The statute does, however, apply to those agreements “[w]here the manifest intent and

1 understanding of the parties, as gathered from the words used and the circumstances existing at the
2 time [of execution], are that the contract shall not be executed within the year[.]” *Stanley*, 112 P.2d
3 at 1052.

4 Here, it is manifest from the terms of the alleged agreement that Branch Banking could not
5 have fully performed its obligations under the alleged agreement within one year. According to
6 Defendants allegations, Branch Banking “agreed to forbear from enforcing certain rights under the
7 [aforementioned loan] and otherwise refrain from foreclosing on the property securing said [l]oan.”
8 Doc. #74, ¶12. Thus, in order for Branch Banking to fully perform under the alleged agreement, it
9 could *never* exercise certain rights under the loan agreement or foreclose on the property securing
10 the loan. Because this provision plainly envisions that Branch Banking would have an indefinite
11 obligation not to enforce certain rights or foreclose, the agreement, by its terms, could not be fully
12 performed in one year.

13 In this regard, the Court agrees with the reasoning set forth in *MGM Desert Inn, Inc. v. Shack*, 809 F. Supp. 783 (D. Nev. 1993). Similarly there, the defendant alleged that the MGM
14 orally “agreed to advance him money with which to gamble, he agreed to write them a check to
15 cover this advance, but they agreed not to present this check for payment.” *Id.* at 786. The
16 defendant further argued that, by presenting his check for payment, the MGM had violated this oral
17 contract. *Id.* There, the court found that Nevada’s Statute of Frauds rendered the defendant’s
18 argument meritless. In essence, the MGM was not capable of fully performing its end of the
19 bargain—not presenting the check for payment—within one year. Instead, MGM’s alleged
20 obligation not to present the check for payment endured indefinitely, and thus well beyond one
21 year. For the same reasons, the Court finds that the Nevada’s Statute of Frauds renders the alleged
22 oral agreement between Branch Banking and Defendants void.

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24 Moreover, while the alleged agreement does not explicitly set forth a specific time frame in
25 which the real estate property action plan was to be executed, and it is conceivable that Defendants
26 could have proposed and implemented a plan within one year, the circumstances suggest that it was

1 not in the parties' contemplation at the time. *See Stanley*, 112 P.2d at 1052 ("[T]he possibility of
 2 performance which would take an agreement out of the statute of frauds must be such as could
 3 fairly and reasonably be said to have been within the contemplation of the parties. An unforeseen
 4 or remote possibility will not rescue the agreement from invalidity."). Here, Defendants' claim
 5 necessarily relies on an assertion that two years was not an "adequate time and opportunity to
 6 propose and implement a real estate property action plan." Doc. #74, ¶8. Defendants' admission in
 7 this regard strongly demonstrates that they did not anticipate or intend to fully perform the oral
 8 agreement within the span of one year. For this reason as well, the alleged agreement is void for
 9 failure to comply with the Nevada Statute of Frauds. Accordingly, Defendants' claim for breach of
 10 oral contract fails on this basis as well.

11 **B. Second Cause of Action for Promissory Estoppel**

12 Here, the Court finds that Defendants' promissory estoppel claim must fail because it is
 13 based upon an alleged promise that is not sufficiently definite to enable enforcement. Indeed, "[a]
 14 promise giving rise to the application of the doctrine of promissory estoppel must be 'clear and
 15 unambiguous' in its terms." *Hubel v. BAC Home Loans Servicing, LP*, Case No. 2:10-CV-01476-
 16 JCM-LRL, 2010 WL 4983456, *3 (D. Nev. 2010) (quoting *Miller Auto. Group, Inc. v. Gen. Motors*
 17 *Corp.*, 216 F.3d 1083, at *1 (9th Cir. 2000); *Navarro v. BAC Home Loans LLC*, Case No. 2:11-
 18 CV-01557-JCM-GWF, 2011 WL 6012547, at *2 (D. Nev. 2011). To recognize and enforce a
 19 promise, "it must be definite enough so that the court can 'determine the scope of the duty, and the
 20 limits of performance must be sufficiently defined to provide a rational basis for the assessment of
 21 damages.'" *Hubel*, 2010 WL 4983456, at *3; *Navarro*, 2011 WL 6012547, at *2 (quoting *Ladas v.*
 22 *Cal. State Auto. Ass'n*, 19 Cal. App. 4th 761, 770 (1993)). "If the promise is 'vague, general or of
 23 indeterminate application,' it is not enforceable." *Id.* (quoting *Aguilar v. Int'l Longshoremen's*
 24 *Union Local No. 10*, 966 F.2d 443, 446 (9th Cir. 1992)).

25 Defendants have failed to sufficiently allege a promise from which the Court could
 26 determine the scope and duties of the parties. Branch Banking's alleged promise to "provide

1 Defendants with adequate time and opportunity to propose and implement a real estate property
2 action plan to address and work-out certain Colonial Bank loans" (Doc. #74, ¶8) is entirely lacking
3 in detail. Moreover, Branch Banking's alleged promise to "otherwise refrain from foreclosing on
4 the property" (Doc. #74, ¶12) is similarly indefinite. Under no circumstances could the Court
5 enforce such promises because there is no indication of the terms according to which Defendants
6 would "address and work-out" the loans and Branch Banking would refrain from foreclosing.
7 Specifically, Defendants do not allege that Branch Banking promised to modify the terms of its
8 loan agreement. *See Brennan v. Wells Fargo & Co.*, No. 5:11-cv-00921 JF (PSG), 2011 WL
9 2550839, at *2 (N.D. Cal. June 27, 2011) (plaintiff failed to adequately plead a claim for
10 promissory estoppel where "there [was] no allegation that Wells Fargo promised to modify the
11 terms of Brennan's loan"). Nor do Defendants set forth any parameters as to Branch Banking's
12 obligation to accept Defendants' proposed work-out plan. *See Melegrito v. CitiMortgage Inc.*, No.
13 C 11-01765 LB, 2011 WL 2197534, at *13 (N.D. Cal. June 6, 2011) ("conclusory allegations about
14 an unspecified individual agreeing to a loan modification with unspecified terms at some point in
15 the unspecified future are insufficient to permit the court to reasonably infer that [defendant] made
16 a clear promise to modify [plaintiff's] loan"). Without greater specificity as to the parties' rights
17 and obligations under the alleged oral contract, the Court would have no rational basis on which to
18 assess damages. Accordingly, the Court finds Defendants have failed to sufficiently allege a claim
19 for promissory estoppel.

20 Moreover, in light of the aforementioned loan provisions, the Court also finds that
21 Defendants cannot establish the requisite elements of promissory estoppel. Given the explicit
22 language therein, Defendants cannot claim to be ignorant of the fact that Branch Banking's alleged
23 promise to waive its right to foreclose on the underlying property would have to be reduced to
24 writing. *See Pink v. Busch*, 100 Nev. 684, 689 (1984) ("To establish promissory estoppel four
25 elements must exist: (1) the party to be estopped must be apprised of the true facts; (2) he must
26 intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the

1 right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true
 2 state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.””

3 (quoting *Chequer, Inc. v. Painters & Decorators Joint Comm., Inc.*, 98 Nev. 609, 614 (1982)).

4 Moreover, to the extent Defendants claim to have relied on Branch Banking’s alleged oral promise
 5 not to foreclose on the underlying property, their reliance was not reasonable given the explicit
 6 writing requirement in the loan documents. *See Aguilar. Int’l Longshoremen’s Union Local No.*
 7 10, 966 F.2d 443, 445 (9th Cir. 1992) (“To establish an enforceable contract on a promissory
 8 estoppel theory, the [plaintiff] must meet five requirements[:] (1) the existence of a promise,
 9 (2) which the promisor reasonably should have expected to induce the promisee’s reliance, (3)
 10 which actually induces such reliance, (4) that such reliance is reasonable, and (5) that injustice can
 11 only be avoided by enforcement of the promise.”) (citing *Hass v. Darigold Dairy Products, Inc.*,
 12 751 F.2d 1096, 1100 (9th Cir. 1985); Restatement (Second) of Contracts § 90 (1981)).

13 Accordingly, Defendants’ promissory estoppel claim fails on this basis as well.

14 Branch Banking also contends that Defendants’ promissory estoppel claim does not comply
 15 with the specificity requirements analogous to the heightened pleading standard for fraud under
 16 Nevada and Federal Rule of Civil Procedure 9(b). “Although Rule 9(b) does not expressly apply to
 17 promissory estoppel claims, . . . Rule 9(b)’s heightened pleading standard applies because
 18 promissory estoppel involves false statements and conduct amounting to misrepresentation.”

19 *Hasan v. Ocwen Loan Servicing, LLC*, 2:10-CV-00476-RLH, 2010 WL 2757971, at *2 (D. Nev.

20 2010). Compliance with this general rule requires “an account of the time, place, and specific
 21 content of the false representations, as well as the identities of the parties to the
 22 misrepresentations.” *Id.* (quoting *Swartz v. KPMG, LLP*, 476 F.3d 756, 764 (9th Cir. 2007)). For
 23 the reasons identified above, the Court concludes that Defendants failed to allege the specific
 24 content of Branch Banking’s false representations. Accordingly, Defendants’ claim for promissory
 25 estoppel also fails for failure to comply with the heightened pleading standard.

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1 Finally, Branch Banking contends that Defendants executed an Acknowledgment⁵ that
 2 Branch Banking's acceptance of payments after Defendants' default did not prejudice Branch
 3 Banking with respect to its rights and remedies under the subject loan agreements. Doc. #90, Ex. 3;
 4 Doc. #1, Ex. 7. Specifically, the Acknowledgment provides, in relevant part,

5 While such discussions have been conducted, the Lender has accepted and
 6 applied payments under some of all of the Loans even though such Loans have
 7 matured and are due and payable in full. The purpose of this letter is to confirm our
 8 understanding that the acceptance of such payments post-maturity shall not
 9 constitute a waiver by the Lender of any existing defaults under the Loans, or
 10 prejudice the Lender in exercising any and all rights and remedies under the loan
 11 documents evidencing and/or securing the Loans or under applicable law.

12 Although the Lender is willing to continue good faith discussions with the
 13 Borrowers in an effort to restructure the Loans, it must be made clear that such
 14 discussions, and the continued acceptance of payments post-maturity, (i) shall not be
 15 construed as an extension of the maturity dates of the Loans, and (ii) are without any
 16 prejudice to the Lender in the exercise of its rights and remedies with respect to the
 17 Loans. Furthermore, Lender reserves the right in its sole discretion to terminate
 18 discussions at any time and thereafter exercise its right and remedies.

19 Id. at BBT000034. Moreover, Branch Banking contends that during the course of the loan, each
 20 time the loans were modified, the parties agreed to and executed certain "change in terms"
 21 agreements which were always reduced to writing. *See, e.g.*, Doc. #1, Ex. 4; Doc. #1, Ex. 5.

22 Based on the Acknowledgment's language and the parties' previous practices, the Court
 23 finds that Defendants cannot dispute that they understood that they were only in "discussions" with
 24 Branch Banking regarding "possible restructuring of various loans." Defendants were apprised of
 25 the true facts regarding discussions to restructure the loans, and thus cannot establish that they
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27 ⁵ Here too, Branch Banking attached and incorporated the acknowledgment letter to its
 28 Complaint. *See* Doc. #1, Ex. 7, pp. 5-9. Defendants do not contest the authenticity of the
 29 acknowledgment letter. *See* Doc. #74, ¶25. Accordingly, the Court shall consider the acknowledgment
 30 letter in evaluating the viability of Defendants' Counterclaim for promissory estoppel.

31 Defendant Yoel Iny executed the Acknowledgment as President of, among others, Defendant
 32 Sossaman & Guadalupe Plaza, LLC and D.M.S.I., LLC. Defendants Yoel Iny and Noam Schwartz also
 33 executed the Acknowledgment on their own behalf.

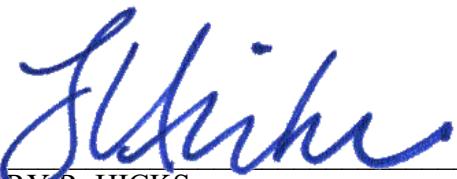
1 reasonably relied on Branch Banking's alleged promises. Accordingly, Defendants' claim for
2 promissory estoppel fails on this basis as well.

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4 IT IS THEREFORE ORDERED that Branch Banking's Motion to Dismiss Counterclaims
5 (Doc. #90) is GRANTED.

6 IT IS FURTHER ORDERED that Defendants' Counterclaim shall be DISMISSED with
7 prejudice.

8 IT IS SO ORDERED.

9 DATED this 29th day of March, 2014.

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11 
12 LARRY R. HICKS
13 UNITED STATES DISTRICT JUDGE
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